Marcia R. Meoli

From: John T. Gregg, Editor <marcia@federalbarassociationwmbankrupcey.ccsend.com> on behalf of John T. Gregg, Editor <jgregg@btlaw.com>
Sent: Tuesday, June 08, 2010 2:27 PM
To: Marcia Meoli
Subject: Federal Bar Association - Bankruptcy Section

Federal Bar Association

Bankruptcy Section Newsletter
June 2010

This newsletter is published by the Federal Bar Association, Bankruptcy Section, for the Western District of Michigan. Prepared by lawyers with busy practices, every effort is made to publish on a quarterly basis. For your records, here are the dates of newsletters for the recent past: October 2009, June 2009, March 2009, October 2008, July 2008, April, 2008, January 2008, October 2007, August 2007, April 2007, January 2007, October 2006, July 2006, February 2006, October 2005, June 2005, February 2005, October 2004, May 2004, January 2004, October 2003, July 2003, April 2003 and January 2003.

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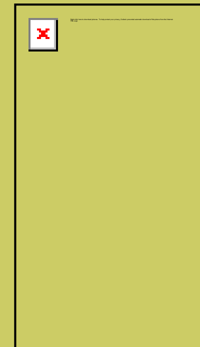
- News from the Bankruptcy Court
- Recent Case Summaries

Editor's Note

For the past several years, Dan Bylenga provided timely and informative summaries of recent cases in this District and the 6th Circuit. Dan has passed the torch for future case summaries,



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including those herein, to Greg Ekdahl, James Oppenhuizen and Ben White, all of whom practice at Keller & Almassian PLC.

In the forthcoming editions of the newsletter, it is my hope that the membership will view the newsletter as not only a source for news, but also thoughtful insight with respect to recent legal developments, whether in the Western and Eastern Districts of Michigan, the Sixth Circuit or even nationally. As always, the membership is invited to submit short articles addressing notable recent developments. Submissions need not be filled with citations or considered "law review" caliber. Rather, mere observations or short analyses of relevant issues and/or creative arguments, whether set forth in pleadings or published/unpublished decisions, are welcome.

In addition, members should contact the editor if they wish to post announcements or other news (e.g., promotions, awards, appointments, and firm mergers) in the announcements section of the upcoming newsletter. In the event that you have any suggestions or criticism, please feel free to contact the editor at jgregg@btlaw.com or Barnes & Thornburg LLP, Attn: John T. Gregg, 171 Monroe Avenue, NW, Suite 1000, Grand Rapids, Michigan 49503.

News from the FBA Bankruptcy Section

2010 FBA Seminar

On July 24-24, 2010, the FBA Bankruptcy Section will hold its annual seminar at the Park Place Hotel in Traverse City, Michigan. The Seminar Chair, Fran Ferguson, and the Educational Chair, the Honorable James D. Gregg, have assembled a highly respected faculty for the programs, including, among others, (i) the Honorable Robert E. Gerber from the United States Bankruptcy Court for the Southern District of New York, who presides over the General Motors bankruptcy, (ii) Professor Kenneth Klee, Professor of Law at the UCLA Law School and author of Bankruptcy and the Supreme Court (Lexis-Nexis 2008), (iii) the Honorable Jeffrey P. Hopkins from the United States Bankruptcy Court for the Southern District of Ohio and former President of the National Conference of Bankruptcy Judges, (iv) the Honorable Margaret D. McGarity from the United States Bankruptcy Court for the Eastern District of Wisconsin, and (v) Samuel K. Croker, a Chapter 7 trustee practicing in Nashville, Tennessee and a former President of the National Association of Bankruptcy Trustees. For information and registration materials please refer to the FBA 2010 Summer Seminar link in the Quick Links section of this Newsletter.

Quick Links...

United States Bankruptcy Court, Western District of Michigan

Local filing statistics

United States Trustee Program, including means test tables and other BACPA data

United States Bankruptcy Courts

Chapter 13 Trustee Brett N. Rodgers

Chapter 13 Trustee Mary K. Viegelahn Hamlin

Federal post judgment rate of interest

State Bar of Michigan

American Bankruptcy Institute

National Association of Bankruptcy Trustees

National Conference of Bankruptcy Judges

National Association of Consumer Bankruptcy Attorneys

National Association of Chapter 13 Trustees

Federal Bar Association of Western Michigan

Pro bono procedures and client retainer agreement

Introduction of Wireless Service at the Bankruptcy Court

Prepared by: Mike Ley
Chief Deputy
United States Bankruptcy Court
for the Western District of Michigan

The Bankruptcy Court and FBA Bankruptcy Steering Committee are currently working together to implement wireless internet service in the bankruptcy courthouse. The input of Rebecca Johnson was instrumental in helping to detail the implementation plan for the wireless internet system that was agreed upon and approved. Personal Business Systems will be installing the wireless system in the bankruptcy courthouse on behalf of the FBA Bankruptcy Steering Committee and with the support of the bankruptcy IT department. The Bankruptcy Court has a new Courthouse Wireless Policy that it will unveil to the public coinciding with the availability of this new wireless service. The new Courthouse Wireless Policy is in addition to the FBA Bankruptcy's own guide for attorneys using this new service. The wireless service will be offered and governed by the FBA Bankruptcy Steering Committee and is hopefully, coming this summer.

Western District of Michigan Pro Bono Program Looking for Attorneys

The term "free lawyer" may seem like an oxymoron, particularly when discussing bankruptcy practice, where the effort to get paid by a bankrupt entity is an everyday concern for many practitioners. More specifically, any consumer practitioner will attest to the notion that practically any bankruptcy client is in a potential pro bono situation. The very concept of bankruptcy must consider that a Debtor may not have disposable income at a time when a bankruptcy practitioner is likely to request payment. Despite all of this, the need for pro bono representation continues to exist in our District. Pro se litigants need lawyers, and some lawyers (particularly newer lawyers) may benefit from isolated opportunities to gain valuable courtroom and trial experience.

Recently, efforts have been initiated to jumpstart a bankruptcy pro bono program in the Western District of Michigan in hopes to merge some of these needs and benefits. At this point, the program envisions a role for pro bono counsel in certain contested matters, such as lift of stay, exemption, or adversary proceedings (exceptions to discharge, avoidance actions regarding preference or fraudulent conveyance) to name a few. These situations can offer distinct and isolated opportunities for significant federal litigation that could cover matters ranging from pretrial through bench trial. The program has also

New dollar amounts in bankrutpcy

Information on reporting bankrutpcy fraud

FBA 2010 Summer Seminar

considered the need for certain distinct and identifiable Debtors who may require assistance with petition preparation and advice at first meetings.

Attorneys who have taken on pro bono matters can attest that the opportunity for trial or other courtroom practice can be invaluable. Brion Doyle, an associate with Varnum, recently took advantage of this type of available pro bono situation in bankruptcy court and was able to complete a full bench trial. These types of opportunities may not always be possible for an attorney at the early stages of a career. The pro bono program hopes to make these types of opportunities more readily available to willing attorneys, while also streamlining a process by which qualified and pre screened matters are identified and connected with these attorneys.

Although a work in progress, the program is currently looking for attorneys who might be interested in volunteering some of their valuable time in order to gain courtroom experience and practice, and for consumer counsel who would be willing to volunteer assistance with isolated and pre-screened chapter 7 matters. If interested in volunteering, or if you would like to be kept aware of further developments, please contact Greg Ekdahl at gregekdahl@kvalawyers.com. Questions or other comments can also be addressed by Steve Bylenga at Fresh Start Legal Group, Sarah Howard at Warner, Norcross & Judd, and Brion Doyle at Varnum.

Bankruptcy Law: Counseling and Communicating Effectively With Your Client

By: Wafa Adib-Lobo
Wardrop & Wardrop, P.C.

The first year of practice after law school is an exciting and yet humbling experience for brand new associates, especially if you are starting in a field which is new and unfamiliar. For me, it was "exciting" because, after years of hard work, deadlines and sleepless nights, and dreaded finals, I thought I was finally in a position to apply all those golden nuggets of law I had accumulated during my academic career. And, "humbling" as I realized after a few months of practice, how much I had yet to learn.

As I entered the world of bankruptcy law, I was introduced to a hybrid of state and federal law. I had flash backs from Civil Procedure, "Federal Courts are courts of limited jurisdiction" and the "Erie Doctrine" echoed in my head, "Federal Courts must apply the substantive law of the State they are located in- - -". Albeit, Bankruptcy Law is a unique creature. When I first started practicing, I heard comments like" Oh bankruptcy law- - isn't that all on software?" and "That's pretty easy, isn't it? All

you have to do is input everything, and the rest of the work is done by the software". Well, yes and no.

It is true that computer software is used by most law firms to generate bankruptcy schedules. However, what these comments reflect is the general lack of understanding of the complexities that can arise in the context of bankruptcy law; the interplay of bankruptcy law and other areas of law, such as property law, secured transactions, family law, and probate and estate law can make bankruptcy challenging but also interesting. And, there is yet another major aspect of bankruptcy law that a lot of people don't immediately think about, and that is client interaction and counseling.

The role of an attorney as a counselor is most prevalent in bankruptcy law, and client interaction with clear communication is crucial to a successful practice. I'd like to dwell a bit further into this aspect of bankruptcy law practice, because, I think a lot of new associates are so intent on learning a new area of law that they sometimes forget that the first step to a successful practice is successful communication. I believe keeping these few factors in mind is helpful not only for bankruptcy attorneys, but for those starting in any new area of law practice:

Remember that bankruptcy is often the client's last resort. Most clients are filing for bankruptcy after all other options have failed. Usually their lives are in disarray, and in addition to being faced with a financial conundrum, they are also under tremendous stress. Strained personal relationships, harassment from creditors and the social stigma associated with bankruptcy are all factors that can add to this level of stress. Some clients may be faced with the harsh reality that they have to vacate their only known home. Relocating from a community of which they have become an integral part can also be devastating. As a counselor, an attorney must keep these realities in mind, especially when making demands from clients. It is easy to get frustrated with a client that is late in producing pertinent documentation, or who cannot remember all the crucial details. However, being aware of the client's state of mind can help the attorney work more efficiently. For example, I often follow up document requests with brief phone calls or reminders, because I know some of my clients are under a lot of stress and may be forgetful.

An attorney must realize that although, it may sound narcissistic, clients may look up to the attorney as a "saving grace"; they may look at you as someone who will provide salvation during the difficult times they are enduring. Remember, that it is important to keep the client's expectations realistic. Clients expect the attorney to have all the answers. If you are not sure about a particular issue, check with your mentor, do the necessary research and get back. Don't be pressurized into answering on

the spot just to pacify your client-that's an easy way to earn malpractice law suits.

Always communicate and reiterate what the client's end objectives are and whether these objectives are realistic enough to be achieved. I've heard many clients say" I never thought I would have to file bankruptcy" or that "I never thought I would be in this situation". While in denial, sometimes clients do not hear the attorney's advice. It is important to repeat the ramifications of the legal decisions that are being made. For example, I always try to list the pros and cons of filing for bankruptcy, as applied to the client's circumstances. This gives them a better understanding of how things work.

It is important to empathize with your client, but always be objective. Do not be overly empathetic. Never try to shield your client from unpleasant news. Remember, that your client depends on you for a sincere answer, even if the answer is not favorable to the client.

Your clients trust you with their finances, and sometimes their very personal and private matters. Not only is confidentiality key, but an attorney must establish a channel of communication and honesty with the client. Verbalizing to the client that their private information is confidential is very important. It puts the client at ease and makes communication easier.

Last but not least, as a bankruptcy attorney, you are not only playing the role of an advocate, but you are also responsible for assembling and organizing all the pertinent information for the client. This task involves not only open and honest communication, but a deep understanding and perhaps even a level of empathy for the client's life circumstances and their psychological state. Some clients may come to you suffering from depression, while others may manifest their stresses in the form of physical illness. But, it is the attorneys' role as a counselor to work past these obstacles, and to make sure that in-depth investigation is conducted so that accurate information can be filed on the client's behalf. Sometimes clients leave out important details. An attorney must be able to spot the missing information and ask relevant questions that lead to the informative answers. Often this requires sifting through a plethora of legally irrelevant facts, and picking out the pertinent facts crucial to the client's case. This is where the attorney's law school training and skills come into play. Knowing the law and applying it to your client's situation is key for the benefit of your client. But at all times, as an attorney, you must be aware that you are counseling your client. And, in the realm of bankruptcy, you are helping your client piece together their lives and enabling them to make a "fresh start".

News from the Bankruptcy Court

Entity Offering Free Nationwide Pre-Petition Credit Counseling

ConsumerBankruptcyCounseling.info is a United States Trustee-approved budget and credit counseling agency offering free, nationwide pre- petition credit counseling pursuant to 11 U.S.C. § l09 (h). This is a public service project of the Tides Center. For more information, go to: http://consumerbankruptcycounseling.info/cbcp/ab out.html.

Recent Case Summaries

Prepared by:

Greg J. Ekdahl
James R. Oppenhuizen
Ben M. White
Keller & Almassian, PLC

United Student Aid Funds, Inc. v. Espinosa, -- U.S. -- , 130 S. Ct. 1367 (2010)

A Chapter 13 debtor obtained confirmation of a plan proposing to pay only the principal amount of the debtor's student loan debt and to discharge the accrued interest, despite having neither initiated an adversary proceeding nor obtained an "undue hardship" determination from the court. The student loan creditor had received notice of the proposed plan. Once the debtor paid the student loan principal, the court discharged the interest. Three years later, when the student loan creditor intercepted the debtor's income tax refund to satisfy the unpaid student loan debt, the debtor petitioned the court for an order holding the creditor in contempt for violating the discharge injunction.

A plan proposed under Chapter 13 of the Bankruptcy Code becomes effective upon confirmation, 11 U.S.C. §§1324, 1325, and will result in a discharge of the debts listed in the plan if the debtor completes the plan payments, §1328(a). A debtor may obtain a discharge of government-sponsored student loan debts only if failure to discharge that debt would impose an "undue hardship" on the debtor and their dependents. §§523(a)(8); 1328. Bankruptcy courts must make this undue hardship determination in an adversary proceeding, Fed. Rule Bkrtcy. Proc. 7001 (6).

The Supreme Court held the failure to serve a summons

violated the creditor's procedural rights under Rule 7004(b)(3), but was not a violation of its constitutional right to due process because the creditor had received actual notice of the filing and contents of the plan. The bankruptcy court's failure to find undue hardship under §523(a)(8) was not a jurisdictional or notice failing that would void the judgment under Rule 60(b)(4). Given the clear and self-executing requirements for an undue hardship determination, the court's failure to find undue hardship prior to confirming the plan was legal error. However, the confirmation order remained enforceable and binding because the creditor had notice of the error and failed to object or appeal. The Court further held that failure to comply with the undue- hardship requirements should prevent confirmation, even if the creditor fails to object, since a Bankruptcy court may only confirm plans that, *inter alia*, comply with the "applicable provisions" of the Code. §1325(a). But Rule 60(b)(4) is not the appropriate remedy for discouraging debtors from filing plans proposing to dispense with the undue hardship requirements. Rather, the deterrent should be the penalties that debtors and their attorneys face under various provisions for engaging in improper conduct.

Milavetz, Gallop & Milavetz, P.A., et al. v. United States, -- U.S. --, 130 S. Ct. 1324 (2010)

Consumer bankruptcy law firm, its president and an attorney for firm, coupled with two clients of the firm filed suit against the United States seeking a declaratory judgment that attorneys were not "Debt Relief Agencies" and that certain provisions of BAPCPA are unconstitutional. These provisions were claimed to be unconstitutional as applied to consumer debtors' attorneys and centered on consumer debtors' attorneys being designated "Debt Relief Agencies" and the regulations that accompany that designation. The Supreme Court held that Attorneys who provide bankruptcy assistance to assisted persons are "Debt Relief Agencies" under BAPCPA; after narrowly construing the requirement that debt relief agencies cannot advise prospective clients to incur new debt in contemplation of bankruptcy, the Court determined that the regulation of speech was not unconstitutionally vague or unconstitutional as applied to attorneys. The Court construed the regulation such that attorneys (Debt Relief Agencies) cannot advise clients (assisted persons) to incur new debt because they are filing bankruptcy, as opposed to for a legitimate purpose.

In re Hight, 426 B.R. 258 (Bankr. W.D. Mich. 2010)

Chapter 13 debtor filed her petition for relief on January 28, 2009, prior to completing her 2008 state income tax return. Debtor completed and filed her state tax return just prior to the April 15th, 2009 due date, revealing she owed the State $4,900.00. The debtor's plan did not provide for the application

of § 1305 to post-petition claims. The State did not file a proof of claim for the taxes. The debtor filed a protective claim on July 19, 2009 under §501(c). The State objected to the protective claim, asserting that §1305 solely governed the filing of the tax claim and that 1305 only permitted the State as claimant to file the tax claim. The court held the straddling income tax liability debtor owed for the immediately preceding tax year, for which a return was not yet due when her Chapter 13 petition was filed, was a post-petition debt. The court held Section 1322(a)(2), in conjunction with Section 507(a)(8) and 502(i), compel a Chapter 13 debtor to provide in the plan for straddling post- petition tax claims. The court further held the debtor could file a protective claim on the State's behalf pursuant to sections 501(a) and 101(10)(B).

In re Westfall, 599 F.3d 498 (6th Cir. 2010)

Purchase-money motor vehicle lender objected to confirmation of debtors' proposed Chapter 13 plan, as impermissibly bifurcating their claims in violation of the "hanging paragraph" of 11 U.S.C. § 1325(a). The court addressed whether the protection from "cramdown" offered by the so-called "hanging paragraph" applied to the portion of a creditor's secured claim attributable to the payoff of negative equity in a trade-in vehicle. The court held negative equity financing constituted a purchase money obligation under the UCC and thus the associated security interest satisfied the UCC's definition of a purchase money security interest. The Court held the portion of a creditor's secured claim attributable to the payoff of negative equity qualified for protection from cramdown under the hanging paragraph.

In re Lewis, 423 B.R. 742 (Bankr. W.D. Mich. 2010)

Chapter 7 debtor brought adversary proceeding for determination of dischargeability of his obligations under temporary order entered by state divorce court in pending divorce proceedings with his estranged wife. The court held debtor's obligation to his estranged wife, as result of temporary order entered by state divorce court, to pay mortgage debt on home where wife resided and certain credit card debt, was not in nature of support and was not excepted from discharge as "domestic support obligation." The court went on to hold that whether, under Michigan law, a state divorce court had authority to order Chapter 7 debtor-husband to make payments directly to third parties were matters bankruptcy court would abstain from hearing. The court noted that "because the state courts now have concurrent jurisdiction over divorce- related nondischargeable debt issues, unless the case is a chapter 13, it is unlikely that this court will ever be requested to decide any possible nondischargeable debt issues. With very limited exceptions, the bankruptcy court is no longer in the divorce and

domestic relations business."

In re Level Propane Gases, Inc., 2010 WL 1255669 (B.A.P. 6th Cir. April 2, 2010)

A chapter 11 creditor filed an adversary proceeding seeking to revoke the confirmation order and find various orders entered by bankruptcy court to be null and void, via allegations of fraud under 11 USC § 1144. The bankruptcy court dismissed the complaint and creditor appealed. The appellant argued it was error for the bankruptcy court not to consider potentially incriminating e-mails between some of Debtors' employees as sufficient to state a claim for revocation of the confirmation order. The BAP held against the appellant, finding the alleged "new" evidence introduced by appellant was the same kind of evidence which had been rejected time and time again by the bankruptcy court itself and failed to establish the bankruptcy court was misled or relied on misrepresentations. The BAP went on to hold that because appellant had failed to challenge any of the bankruptcy court's prior orders, he was barred from challenging them later because of the doctrine of laches, finality, and the binding provisions of the confirmed plan. The BAP cited *In re Chattanooga Wholesale Antiques, Inc.*, 930 F.2d 458, 463 (6th Cir. 1991), noting "confirmation of a plan of reorganization by the bankruptcy court has the effect of a judgment by the district court and res judicata principles bar relitigation of any issues raised or that could have been raised in the confirmation proceedings."

In re Quality Stores, Inc., 424 B.R. 237 (W.D. Mich. 2010)

Quality Stores, Inc. sought refund of money paid to the Internal Revenue Service for FICA taxes on severance package payments to former employees. The Bankruptcy Court held that payments made to the employees pursuant to severance packages were not "wages" for the purposes of FICA taxation. In affirming the bankruptcy court, the United States District Court for the Western District of Michigan held that severance payments fall within a specific exception to the definition of "wages" (26 U.S.C. § 3402 (o)(2)), and therefore are not taxable for the purposes of FICA taxation.

In re Hollinshead, 2010 WL 727969 (B.A.P. 6th Cir. March 3, 2010)

Pro se Debtor amended her Schedules B and C to disclose and claim as exempt her tax refund for the prior year after Trustee filed a motion to compel turnover, after the court ordered an accounting for the portion of the refund that was spent. The trustee objected to the claim of exemption on various grounds, but abandoned all except that exemption was claimed in bad faith or with reckless indifference to the accuracy and

completeness of her schedules. The bankruptcy court overruled the objection. In affirming the bankruptcy court's ruling, the Sixth Circuit Bankruptcy Appellate Panel stated that the bankruptcy court's findings of fact were reasonable and supported by the evidence in that the trustee clearly knew of the right to the refund, and there was no evidence that Debtor intended to hide the asset.

In re Trudell, 424 B.R. 786 (Bankr. W.D. Mich. 2010)

Trustee objected to Debtors' claim of exemptions in their 2008 tax refunds because the Debtors' original schedules indicated they anticipated no 2008 tax refund despite preparing and filing returns only a few weeks later showing the Debtors were entitled to a refund of over $5,000.00. The schedules were not amended until several weeks after the returns were filed. Before the trustee's objection was heard, the refunds were spent. The court determined that since the Debtors spent their refund, thus mooting the objection to exemptions as the property was taken out of the estate. However, the court determined it would hold a hearing to determine whether Debtors' attorney should be sanctioned for not listing the potential refund as an asset, when the attorney relied upon his professional expertise to determine that no refund was expected.

In re Flemming, Case No. HG 05-13002 (Bankr. W.D. Mich. 2010)

More than three years after Debtors received their 2005 tax refund, trustee moved for turnover of the dollar amount of Debtors' unscheduled, but spent tax refund, pursuant to 11 U.S.C. § 542. The court, in denying trustee's motion, set out guidelines it will use in ruling on motions for turnover of prematurely spent tax refunds. First, the trustee must quickly move to determine whether he or she will file a motion for turnover (e.g. 60 days). Second, if the debtor spends the refund before the trustee can take action to preserve the estate's interest in the refund (i.e. before the claimed exemption is allowed), whether the trustee will be able to recover the refund will depend upon when the refund was spent in relation to when it was disclosed and claimed as exempt. The debtor will always be liable for turnover if the refund is spent before it is disclosed. The debtor should be liable if it is spent after it was disclosed, but before the exemption is claimed. However, if the asset is disclosed and claimed as exempt, then spent before the deadline for an objection to the exemption, the debtor will only be required to turn over the dollar amount of the refund if the exemption is not allowed.

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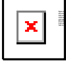

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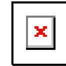

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